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ABSTRACT

The present state of the law is reviewed regarding the "employees" status of graduate and teaching assistants, research fellows, interns, residents, and clinical fellows at various colleges, universities, medical schools, and teaching hospitals. Treatment of these groups as "student" and/or "employees" requires consideration of the unique interrelationships between several parties; e.g., the university, the faculty, the cooperating hospital, and the student. Specific court cases are cited. (Author/LBH)

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SPECIAL REPORT #32

THE APPROPRIATENESS OF COLLECTIVE BARGAINING BETWEEN EDUCATIONAL INSTITUTIONS AND THEIR "STUDENT/EMPLOYEES": A LEGAL ANALYSIS

by

Gerald A. Bodner*

This report describes the present state of the law relative to the "employee" status of graduate and teaching assistants, research fellows, interns, residents and clinical fellows at various colleges, universities, medical schools and teaching hospitals. Treatment of these groups as "students" and/or "employees" requires consideration of the unique inter-relationships between several parties; e.g., the university, the faculty, the cooperating hospital, and the student.

Mr. Bodner's handling of these issues displays a sensitivity to educational needs not found elsewhere in the literature.

Edward P. Kelley, Jr.
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One of the particularly troubling aspects of collective bargaining for post secondary educational institutions arises out of their unique relationship with various groups of individuals who possess - in relation to the institution - certain characteristics of both "student" and "employee" status. The issue arises in regard to such individuals as graduate and teaching assistants at the undergraduate and graduate school level; interns, residents and clinical fellows in a medical school or teaching hospital setting; research fellows in professional and graduate schools, students working in cafeterias or other college and university facilities and various other groups of individuals who in some respects received both material benefit and educational instruction, training and/or certification from the very same institution.(1)

Not surprisingly, the treatment of such individuals by labor boards is far from clearly resolved. Indeed, the governing legislation is far from clear as to the standards for resolution. To begin with, the National Labor Relations Act does not make specific reference to the status of "students" or their entitlement to collective bargaining rights, as it does with various other categories, such as supervisory employees. Clearly, however, the absence of a specific exclusion in the Act can in no sense be considered determinative since the law is well established that the National Labor Relations Board has the full authority to exclude from collective bargaining rights and status other groups of individuals whose exclusion is nowhere specified in the Act; as, for example, "managerial" and "confidential" employees.(2)

No citation has been found to any legislative discussion accompanying either the original Act or its several amendments indicating Congressional consideration of the "employee" status of individuals with a dual "student/employee" relationship to their educational institution. The only reference in the Act that is considered by some (3) to even be remotely related to this issue is the provision of Section 2(12) which sets forth a definition of professional employees as including:

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(1) A tangentially related issue discussed in a subsequent part of this report is the status of students who work some amount of time for a business or institution other than the one in which they are students.

(2) The Supreme Court has ruled in Bell Aerospace, Division of Textron, 416 U.S. 267, that even the Board cannot restore collective bargaining rights to such individuals whose traditional exclusion by the Board takes on the force of law. Thus, the Court has stated that the Board cannot impose the requirement of "conflict" with the interests of the employer as a limitation on the traditional exclusion of managerial employees and the General Counsel of the NLRB has determined that the same reasoning would be applicable to "confidential" employees.

(3) See, for example, the comments of Member Fanning in his dissent in Cedars-Sinai Medical Center, 223 NLRB No. 57, slip op at p. 21.

> "(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a)."

It is argued by advocates of this position that the 2(12)(b) definition was intended to include interns, residents and clinical fellows since they could be said to have "...completed work of specialized instruction and are performing related work under the supervision of (otherwise included) professionals."(4) Presumably, the same conceptual argument can be made to various other categories of graduate or professional level "student/employees", such as graduate and teaching assistants or research fellows. To four of the five members of the NLRB, however, the language of Section 2(12) is unpersuasive, if not irrelevant, since, in their view, Section 2(12) applies only to those whose "employee" status under Section 2(3) of the Act is first established which, of course, is the very issue in regard to such "student/employees." The majority's view seems to be supported by the fact that Section 2(12) of the Act was added in 1947 by the Taft-Hartley Amendments, at a time substantially prior to the Board's assertion of jurisdiction over post secondary educational institutions, (5) or teaching hospitals.(6) It hardly seems likely that Congress intended Section 2(12) to be in any way applicable to the unique relationship of students studying and "working" in the same institution when such institutions had never yet been subjected to National Board jurisdiction.

It should be noted that any discussion of Board treatment of "student/employees" can readily be led astray by consideration of numerous Board cases involving employees of commercial or industrial establishments who also held student status at a secondary or post-secondary educational institution; however, the "employee" status of a student whose work is for <u>other</u> than his own educational institution is markedly different in concept. Thus, it is apparent at the

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(4) Ibid at p. 22.

(5) Board jurisdiction over colleges and universities was first established in 1970 by the Board's decision in <u>Cornell University</u>, 183 NLRB No. 41.

(6) Board jurisidcition over nonprofit hospitals was first established in 1974 when the Taft-Hartley Act was amended to remove the exclusion of private nonprofit hospitals formerly contained in Section 2(2) of the Act.

outset that the consequences of Labor Board determination of "employee" status of students working for another entity falls not on the educational institution but on the commercial employer. Likewise, the finding of "employee" status poses few, if any, problems to the educational relationship between school and students and, indeed, seems to have little bearing whatsoever on the student's relationship with his school (in any way beyond that routinely posed by student activities outside of school hours). Perhaps in recognition of these elementary principles, the Labor Board has generally been inclined to recognize the "employee" status of such students when their inclusion was sought in a bargaining unit of their commercial employer's personnel.(7) Indeed, the Board's primary concern in regard to their inclusion in a commercial employer's bargaining unit was not their "employee" status as such but rather whether their student status elsewhere might be indicative of the "casual" nature of their outside employment, therefore requiring an exclusion on entirely separate grounds.(8)

As for NLRB treatment of an educational institution's own "student/employees," the issue had arisen in several cases between the Board's first assertion of jurisdiction over colleges and universities in 1970 and the most recent series of cases in 1976. An analysis of these earlier decisions is, however, somewhat complicated by what appears to be a lack of specificity in the decisions as to whether the Board was ruling on the issue of whether such students were not "employees" and therefore not includable in any bargaining unit or, rather whether the Board was only indicating that their student status made them sufficiently different from nonstudent employees so as to require their exclusion from a basically nonstudent employee bargaining unit, but leaving open the question of whether such students were "employees" within the meaning of the Act. If the latter, such students would be entitled to collective bargaining if their inclusion was sought in an appropriate bargaining unit, such as one limited to other such "students" working at the educational institution.(9) Actually, in only one of the earlier handful of Board cases on this issue (earlier referring to cases prior to the Board's relatively recent decisions on interns, residents and clinical fellows that will be discussed further on) did the Board make specifically clear its determination that students working at their own educational institution were not to be afforded the status of "employees" and therefore were not entitled to collective bargaining in any unit.(10) Thus, in its decision in Leland Stanford Junior University,(11) the Board made pointedly clear its dermination:

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(7) See, for example, National Cash Register Co., 95 NLRB No. 27; Scope Associates, d/b/a Westbridge, 172 NLRB No. 208.

(8) See, for example, Highview, Inc., 223 NLRB No. 80. It is this very uncertainty that was relied on, perhaps incorrectly, in an important federal court decision on interns, residents and clinical fellows that will be discussed at length further on.

(10) Whether a Board determination under the National Labor Relations Act that individuals are not employees entitled to collective bargaining precludes an assertion of collective bargaining rights for such individuals under a state labor relations act is discussed further on.

(11) 214 NLRB No. 82.

> "that the research assistants...are primarily students, and we conclude that they are not employees within the meaning of Section 2(2) (sic, actually Section 2(3) of the Act."

In one other case, however, also occurring in late 1974, the Board, after finding part-time student workers in their University's cafeteria not to be includable in the same unit as full-time nonstudent employees, went on to make the following determination, which it set forth in a footnote:

> "9. The Petitioner sought in the alternative a unit comprising solely the student employees. In view of the nature of their employment tenure and our conclusion that their primary concern is their studies rather than their part-time employment, we find that it would not effectuate the policies of the Act to direct an election among them as a separate unit for purposes of collective bargaining."(12)

Both logic and the Board's own interpretation in a subsequent decision(13) invevitably lead to the conclusion that the Board's above quoted statement could only mean a determination by the Board to deny such individuals the status and rights of "employees." Indeed, in later commenting on Saga, the Board drew a sharp distinction between its previous treatment of students working for a commercial employer. Thus, in response to a dissent by Members Fanning and Jenkins, the majority ruled:

> "Our colleagues cite several cases for the proposition that students in situations similar to those here have been held entitled to representation. In only one of the cases cited, however, were students working for the educational institution they attended, and in that case the Board found that it would be inappropriate to direct an election in a separate student unit.(4) We think that this distinction is critical."(14)

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(12) Saga Food Service, 212 NLRB No. 113, 86 LRRM 1673, 1674 (1974).
(13) See San Francisco Art Institute, 226 NLRB No. 204, 93 LRRM 1505 (1976) at 1506 and 1508.
(14) San Francisco Art Institute, supra, at 1506. Footnote 4 refers to Saga, supra.

In the other earlier cases, however, the Board did not make specific reference to "employee" or "nonemployee" status but stated only that it was excluding the various individuals involved (including graduate assistants, research assistants and students working in cafeterias) from primarily nonstudent bargaining units. The absence of a specific comment as to nonemployee status in these cases played an important role in a recent federal court case on interns, residents and clinical fellows (discussed at greater length further on) when the Judge relied in large degree on a conclusion:

> "that in the majority of these cases, the Board seems to have acted on the principle that student workers are covered by the Act, and to have simply determined that they should not be part of the particular unit that was petititoned for, and not that they should or could never be part of any collective bargaining unit."(15)

In fact, however, a careful analysis of these cases and the Board's subsequent decision offers little support for the Judge's conclusion that the NLRB ever granted "employee" status to students employed at their own educational institutions.

Actually, in its earliest decisions on such "student/employees" the Board seems to have intentionally not yet reached the admittedly difficult issue of their "employee" status. Indeed, the Board made this rather clear in its decision in the Barnard College case in July of 1973 in which the Board excluded graduate assistants from a sought after unit of office-clerical and other nonprofessional staff employees, with a footnoted comment:

> "In view of our conclusion that the student employees herein do not have a sufficient community of interest with the nonstudent employees, we see no reason at this time to reach the contention made by Wheaton College in its amicus curiae brief that student employees employed by the institutions they attend are not employees within the meaning of Sec. 2(3) of the Act."(16)

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(15) NLRB v. CIR and New York State Labor Relations Board, decision of Judge Stewart, slip op at p. 30.

(16) 204 NLRB No. 155, 83 LRRM 1483, at 1484-5.

By late 1974, however, the Board appears to have not only clearly reached the decision to deny "employee" status to "student/employees" in Leland Stanford, but to make that determination likewise applicable to its less clear previous decisions. Thus, the Board noted in Leland Stanford:

> "In sum, we believe these research assistants (in Leland Stanford who lack employee status) are like the graduate, teaching and research assistants who we found were primarily students in Adelphi University, 195 NLRB 693, 640 (1972)."(17)

And in a recent decision in Clark County Mental Health Center(18) in which the Board again made specifically clear its finding of "non-employee" status for "psychology interns" working at their own facility, the Board specifically noted the relevance of this decision to its earlier decision in College of Pharmaceutical Sciences of the City of New York(19) involving graduate, teaching and research assistants. Logic would dictate, though it could only be conjecture, that the same absolute exclusion as "nonemployees" was also intended by the Board in its two other earlier cases, Georgetown University, 200 NLRB No. 14 (1972) and Cornell University, 202 NLRB No. 41 (1973). What is certain, however, despite the U.S. District Court Judge's comments to the contrary, is that in no case has the Board actually found that students working at their own educational institution were to be considered "employees" or allowed collective bargaining rights under the Act.

As can be observed, a detailed analysis of the Board's earlier cases on "student/employees" is necessary and significant not only for historical reasons, but because it is directly related to crucial issues arising out of the Board's more recent decisions involving interns, residents and clinical fellows, decisions which have perhaps brought the overall issue to a head. It is interesting that what is undoubtedly the Board's most direct treatment of the issue arose in the context of individuals who may well have the greatest degree of "employee" characteristics of the several "student/employee" groups whose status had previously been before the Board. Interns, residents and clinical fellows annually receive from their medical school or teaching hospital a significant amount of money (leaving aside for the moment whether it is a "stipend" or a wage payment) which

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(17) Slip op at p. 8

(18) Clark County Medical Health Center, 225 NLRB No. 105, 92 LRRM 1545, 1546 (1976).

(19) 197 NLRB 959, 80 LRRM 1456 (1972).

generally exceeds $10,000 annually and, at least according to one Board member's factual findings, can sometimes exceed $20,000 per year.(20) Moreover, it is clear that the number of hours of activity spent by the average resident outside of classrooms and on patient care matters often runs sixty hours a week or more (again, leaving aside for the moment whether it is work or educational training). Then too, collective bargaining relationships covering interns, residents and clinical fellows had existed in many more instances and for greater periods of time than was true of all other "student/employee" groups that have come before the Board. Indeed, the Board's majority in no way denied that interns, residents and clinical fellows clearly "...possess certain employee characteristics..." Nevertheless, the majority found, as is also undisputedly the case, that such individuals are also students of the very educational institutions in relation to which they also have certain "employee" characteristics. On balance, the Board concluded that such individuals were "primarily students" and as such did not have the status of statutory "employees" entitled to collective bargaining rights under the Act. As the majority stated:

> "From the foregoing and the entire record, we find that interns, residents and clinical fellows are primarily engaged in graduate educational training at Cedars-Sinai and that their status is therefore that of students rather than of employees. They participate in these programs not for the purpose of earning a living; instead, they are there to pursue the graduate medical education that is a requirement for the practice of medicine. An internship is a requirement for the examination for licensing. And residency and fellowship programs are necessary to qualify for certification in specialties and subspecialties. While the housestaff spends a great percentage of their time in direct patient care, this is simply the means by which the learning process is carried out. It is only through this direct involvement with patients that the graduate medical student is able to acquire the necessary diagnostic skills and experience to practice his profession. The number of hours worked or the quality of the care rendered to

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(20) Cedars-Sinai, supra, dissent of Member Fanning, slip op at p. 15.

> the patients does not result in any change in monetary compensation paid to the house staff members. The stipend remains fixed and it seems clear that the payments are more in the nature of a living allowance than compensation for services rendered. Nor does it appear that those applying for such programs attached any great significance to the amount of the stipend. Rather their choice was based on the quality of the educational program and the opportunity for an extensive training experience. The programs themselves were designed not for the purpose of meeting the hospital's staffing requirements, but rather to allow the student to develop, in a hospital setting, the clinical judgment and the proficiency in clinical skills necessary to the practice of medicine in the area of his choice. The "Essentials", which describes the standards for approved internships and residencies, indicate that the primary function is educational. Moreover, the tenure of a member of the housestaff at Cedars-Sinai is closely related to the length of the student's training program; thus few interns, residents and clinical fellows can expect to, or do, remain to establish an employment relationship with Cedars-Sinai following the completion of their programs.
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> In sum, we believe that interns, residents and clinical fellows are primarily students. We conclude, therefore, that they are not employees within the meaning of Section 2(3) of the Act."(21)

That same conclusion has since been followed in all of the numerous, so-called "house staff" cases that subsequently were brought before the Board; St. Christopher's Hospital, 223 NLRB No. 58, 91 LRRM 1417 (1976); University of Chicago, 223 NLRB No. 154, 92 LRRM 1039 (1976); St. Clare's Hospital, 223 NLRB No. 163, 92 LRRM 1001 (1976); Buffalo General Hospital, 224 NLRB No. 17, 92 LRRM 1197 (1976); Wayne State University, et al, 226 NLRB No. 168, Deaconess Hospital of Buffalo, New York, 226 NLRB No. 164. Moreover, the Board has, of recent date,

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(21) Cedars-Sinai, supra, slip op at p. 7-8.

similarly made that same clear finding of "nonemployee" status in regard to other types of students as well, such as psychology interns at a mental health center[22] and has now more clearly suggested that the same is true of graduate, teaching and research assistants.[23] It has also made that same finding, though in more amorphous language, in regard to part time student janitors.[24]

The Board's landmark decision in Cedars-Sinai and its progeny has engendered forceful attack in three directions. First in those states where state labor legislation or case law authorized collective bargaining either specifically for interns, residents and clinical fellows or for "students" generally, opponents of the Board's majority position have argued that the National Board's finding of "nonemployee" status amounts to a declination to assert jurisdiction which, in their view, renders such individuals subject to state labor laws, such as those of New York, which previously and traditionally permitted collective bargaining by students and, in particular, by interns, residents and clinical fellows.[25] Secondly, opponents have concurrently launched a direct judicial attack against the Board's authority to reach its conclusion in Cedars-Sinai and its progeny.[26] Finally, opponents, assisted by influential Congressional representatives, have initiated major efforts to legislatively reverse the NLRB decisions in this area. Each of these three areas of attack necessitate separate consideration. As to the first means, opponents of the majority position have moved in several key cases, particularly in New York, for state labor board assertion of jurisdiction over interns, residents and clinical fellows on the ground that the majority's decision to deny such individual's "employee" status effectively constitutes an "abandonment" of this area of labor relations which, it is argued, thereby denies the generally applicable principle of federal preemption of covered labor matters. As an interesting, though somewhat difficult to explain aside, the Board majority may itself have assisted this position by its apparently inadvertent notation in one of the several cases on interns, residents and clinical fellows; namely, Kansas City General Hospital, to the effect that inasmuch as the individuals were determined not to be "employees"

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(22) Clark County Mental Health Center, supra.
(23) Ibid at 1546.
(24) San Francisco Art Institute, supra, at 1506.
(25) See, for example, In the Matter of Committee of Interns and Residents v. Albert Einstein College of Medicine, Case No. SA 49810 et.
(26) Physicians National House Staff Association, et al v. Betty Southard Murphy et al, U.S. District Court for the District of Columbia, 77 Civ. 0358.

under the Act then the institution was likewise considered not to be "an employer within the meaning of Section 2(2) of the Act for the purpose of any disputes relating to such personnel,"(27) a notation not made in any of the numerous other Board decisions on interns, residents and clinical fellows either prior or subsequent to this otherwise indistinguishable ruling. Seizing upon the notation in question, a New York State Supreme Court Judge initially ruled in favor of an action brought by a house staff union that the National Board's presumed declination of jurisdiction over the employer therefore did not preempt coverage of such individuals under the provisions of the New York State Labor Relations Act,(28) which was virtually certain to mean the conferral of full collective bargaining rights. Such ruling, though subject to challenge on other grounds, could not be considered totally surprising since the National Act's statutory provision on the National Board's declination of jurisdiction in favor of state labor boards specifically turns on the National Board's determination of covered employer status.(29) Upon learning of the Court's decision with its misplaced reliance on the apparently unintended notation, the NLRB took the unusual step of revising, sua sponte, its original Kansas City decision for the specific purpose of making clear the National Board's retention of jurisdiction over the employer-institution so as to assure federal preemption and thereby deny state board jurisdiction over individuals the National Board determined - as a matter of policy - not to be entitled to the status and collective bargaining rights of "employees." Thus, in its revised Kansas City General Hospital decision,(30) the Board, after expressly finding the hospital to be an employer within the meaning of the Act, made abundantly clear its position:

> "Having exercised its discretion in Cedars-Sinai, by finding residents, interns, and fellows to be primarily students and not "employees" within the meaning of the Act, the Board confirmed, in our view, that it has not put hospital residents and interns beyond the reach of national labor policy, but has rather held that to extend them collective bargaining rights would be contrary to that very policy."

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(27) (initial decison), 225 NLRB No. 14; 92 LRRM 1379 (June, 1976.)
(28) C.I.R. v. N.Y.S. Labor Relations Board, et al, decision dated October 14, 1976 by Justice Gellinoff in Index No. 15928/76, Supreme Court, New York County.
(29) Section 14(c) of the National Labor Relations Act, as amended.
(3)) 225 NLRB No. 14(A), 92 LRRM 1362, issued November 8, 1976.

> "Turning to the preemption question, we believe that it has now become necessary for us to state explicitly that which is, in our view, implicit in the Board's Decision in Cedars-Sinai; that is, at the risk of being somewhat repetitious, that the majority of this Board intended by its decision therein to find federal preemption of the health care field to preclude States from exercising their power to regulate in this area." (Emphasis added)(31)

Accordingly, the Judge in the New York Court decision, upon being presented with the NLRB's revision of its position in Kansas City General Hospital revised his own earlier decision and held the New York State Labor Board to be preempted from jurisdiction,(32) a decision which is even now on appeal. The fascinating series of legal events by no means ended here, however. Shortly after the initial State Court decision allowing State Labor Board jurisdiction, the NLRB went into federal court, in what is known as a "Nash-Finch" action(33), asking the federal court to enjoin any State Board proceedings allowing collective bargaining rights for house staff since doing so would run counter to national labor policy, as established by the NLRB.(34) Instead, just a few days after the New York State Court had reversed itself and denied state labor board jurisdiction,(35) Judge Stewart of the Federal District Court issued a decision in which he concluded that preemption was not applicable in this situation primarily because, in his view, the National Board had failed to establish a sufficiently clear "national labor policy" of denying collective bargaining rights to students who also had characteristics of "employees" at their same educational institution, and that, moreover, the Board had failed to articulate a satisfactory rationale for such a labor policy.(36)

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(31) Ibid, slip op at pp. 5-6.

(32) Decision of Judge Gellinoff dated January 6, 1977 and further clarified by decision of January 20, 1977 in C.I.R. v. N.Y.S.L.R.B., supra.

(33) So named because the NLRB's right to do so was first clearly established in the U.S. Supreme Court's decision in NLRB v. Nash-Finch, 92 S. Ct. 373, 78 LRRM 2967 (1971).

(34) NLRB v. CIR et al, supra.

(35) Interestedly, the federal court was made aware of the state court's reversal of position when the NLRB immediately requested that the federal court proceeding be held in abeyance, which the federal court unexplainedly refused to do.

(36) Decision of Judge Stewart, supra, slip op at pp. 30-31.

Clearly, Judge Stewart's decision raises various questions that will likely be answered in the appeal that is now pending before the U.S. Court of Appeals for the Second Circuit. Thus, the NLRB will undoubtedly challenge the District Court's involvement in a matter generally immune to judicial review in this type of action; namely, national labor policy determinations by the Board to which judicial deference is an essential concept in labor law clearly recognized (though not necessarily followed) by Judge Stewart.(37) Relatedly, the Board will undoubtedly challenge the District Court's conclusion that the Board's labor policy regarding students is either non-existent or is in the direction of permitting students to engage in collective bargaining. In that regard, the District Court might well have wrongly concluded that the Board had previously included comparable "student/employees" in bargaining units, which, as previously detailed, appears to have been true only in the totally different faculty situation involving bargaining rights for students employed not at their own educational institution but in commercial establishments.(38) As can be deduced, the stakes in this complex legal battle, over the technical issue of pre-emption, are quite high; not only would a denial of the principle of pre-emption virtually assure collective bargaining rights for interns, residents and clinical fellows (and likely other "student/employee" groups as well) but in New York and several other states, it would also subject many educational institutions to obligations more burdensome than those under national law since those state labor relations acts also provide for compulsory arbitration of contract terms.(39)

Into this maze of legal proceedings must be added yet another federal court suit, this one initiated by various house staff unions, asking direct judicial reversal of the Board's Cedars-Sinai decision. Under the very limited exception for direct judicial review of NLRB decisions, in what is known as a "Leedom-Kyne" suit,(40) the house staff unions are seeking to prove that the Board's decision in Cedars-Sinai is directly contrary to specific prohibitions contained in the Act.(41) At the time of writing this report, no decision has yet been

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(37) As the District Court noted in passing: "The role of this Court is not to review this original determination by the Board, and we therefore express no opinion as to its soundness," slip op at pp. 21-22.

(38) No other conclusion seems possible since there does not appear to have been any Board decisions allowing collective bargaining rights for students working at their own educational institution.

(39) Section 716 of New York State Labor Relations Act.

(40) So named after the Supreme Court's decision in NLRB v. Leedom-Kyne, 358 U.S. 184 (1958).

(41) Physicians National House Staff Association, supra.

handed down in this suit; however, in view of the very limited nature of a "Leedom-Kyne" review and the very difficult burden on the plaintiff to establish that the Board has acted expressly contrary to a negative prohibition in the Act, it would be rather surprising if this particular suit by the house staff unions was successful.

Perhaps so as not to be outdone by the judicial process, Congress is now concurrently undertaking a review of proposed new legislation that would, in effect, reverse Cedars-Sinai by legislatively requiring collective bargaining rights for interns, residents and clinical fellows; some versions of proposed legislation would also assure bargaining rights to various other groups of "student/employees" as well. While the legislative proposals[42] are still in the process of hearings and further appraisal by the House, a number of possible legislative directions have already been indicated. One would be to legislatively require collective bargaining rights for "student/employees" such as house staff but to narrowly limit, or attempt to limit, subjects of bargaining to major economic considerations such as wages, hours and benefits by expressly excluding the various other potential subjects for bargaining that had often been the main focus of pre-Cedars-Sinai negotiations in states such as New York; subjects such as house staff involvement in hospital committeees, house staff prerogatives, etc. As had been pointed out to the Congressional Committee, however, such a distinction may be more elusory than real, not only because mandatory bargaining on any subjects might well pressure institutions into actual bargaining on supposedly non-mandatory subjects, but also because the dual relationship of the individual to the institution "as both students and employees" tends to obliterate any fine line between even basic economic conditions and basic educational matters. Thus, for example the hours of house staff "work" on patient care relate not only to their service responsibilities but are inseparably intertwined with their education and training in the field of medicine. A second uncertainty at this time is whether pro-labor forces in Congress are desirous only of really requiring collective bargaining for house staff or whether they can and will attempt to expand the collective bargaining requirement to cover all or several other "student/employee" groups, such as graduate assistants, research fellows, medical students doing "scrub" work in patient care, etc.

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(42) See espcially, H.R. 2222, introduced by Representative Thompson, Chairman of the House Labor Committee.

Inasmuch as the ultimate resolution of the status of students working at their educational institutions is more likely at this point to be resolved by determinations of Board policy, judicial deference and Congressional politics than by detailed analysis of the underlying factual situations, specific analysis of the various factual issues involved in the several Board decisions thus far have been omitted. As previously alluded to, one important element is the Board's determination that the payments made to the "student/employees" are more in the nature of a stipend "not determined by the nature of the services rendered or by the number of hours spent..."(43) than they are a wage in the more ordinary sense of that term. In addition, the Board has concluded that the primary purpose of house staff activities is related more to their educational needs than to their economic interests alone.(44) Similarly, the Board has concluded that the institution's primary purpose in the particular activities requested of the "student/employees" arises more from the institution's educational and training responsibilities than from the school or hospital's more narrow economic interests.(45) Various other factors also appear in the Board's several decisions. These include the existing tax exempt status of the monies received, the lack of a high degree of control over the "student/employee" services, and the non-expectation of continued employment for the institution subsequent to the educational and training periods. It might be noted in passing that Board Member Fanning, in his dissent from the Board's decision to deny interns, residents and clinical fellows collective bargaining rights under the Act, sought to distinguish house staff from the situation of other "student/employees" such as the research assistants in Leland Stanford essentially by arguing that the latter's services were not for the benefit of or under the control of the institution while the house staff's services were.(46)

This paper has dwelt almost exclusively with the National Labor Relations Act and decisions of the NLRB, particularly inasmuch as these are of primary importance to private colleges and universities.(47)

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(43) Cedars-Sinai, supra, slip op at p. 6. A similar conclusion can be found in Leland Stanford, supra, at p. 1520.

(44) Cedars-Sinai, supra, slip op at p. 7; Leland Stanford, supra, at pp. 152.

(45) Cedars-Sinai, supra, slip op at p. 8; Leland Stanford, supra, at pp. 1520-21.

(46) Cedars-Sinai, supra, slip op at p. 14.

(47) The NLRB's jurisdictional guidelines for colleges and universities provide for the assertion of jurisdiction wherever the gross annual income of the institution exceeds $1 million annually (exclusive of restricted donations.

As for public educational institutions, their collective bargaining obligations with regard to "student/employees" continue to depend entirely on the special legislation for public employees that exists in at least several industrial states. With regard to house staff specifically, whether state labor boards dealing with public empl yees adopt the same position as the NLRB in Cedars-Sinai is often as much of a political question as a legal one. It is interesting that thus far a request to the state public employee labor boards to adopt the NLRB approach in Cedars-Sinai has been rejected in one state (Massachusetts),(48) and initially rejected but judicially reversed to find "non-employee" status in another (Pennsylvania).(49) In most of the states whe e collective bargaining for public employees is provided for by state legislation, the issue has apparently not yet been directly raised. In some states, such as New York, the probable explanation is likely a sufficient recognition of the political realities to discourage any public institution from even seeking or realistically anticipating state board decisions in line with Cedars-Sinai, while in other states the issue may not yet have ripened and no conclusions can yet be drawn from the current inactivity.

With regard to "student/employees" apart from house staff, at least one state, Wisconsin, after some degree of experience with an actual bargaining unit of teaching assistants at its State University, including various job actions, amended its public employee labor law to specifically exclude students from coverage.(50) It is also known that a formal collective bargaining unit has existed for student food service workers at the U. of Oregon, assumedly pursuant to the Oregon public employees statutes. The 2,200 teaching and research assistants at the U. of Michigan are represented by the Graduate Employees Organization which won a contract providing for decreased tuition and pay increases after a strike in 1975. In addition, a substantial number of UCLA's 1,200 teaching assistants are known to be represented by an AFL-CIO-affiliated organization, the Student Academic Employees Union, which has also engaged in job actions as re ently as April of this year. In February the Oregon Employment Relations Board ruled teaching fellows at the University of Oregon (Eugene) were employees under the State Act and in April the fellows voted to be represented by the American Federation of Teachers. A little noted section of the Iowa law would appear to permit organizing and bargaining among graduate and post graduate assistants by virtue of an exception to the exclusionary section.(51) No other instances of bargaining between post-secondary educational institutions and

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(48) Cambridge Hospital, BNA, Government Employees Relations Report, No. 658, May 24, 1976.

(49) Interns v. Einstein Medical Center, 639 Atl. 2d 711, 92 LRRM 3410 (1976).

(50) Wisconsin Statutes, Section 111.80, as amended.

(51) Code of Iowa, Section 4 (4), as amended.
"Exclusions. The following public employees shall be excluded from the provisions of this Act:
4. Students ...except graduate or other post-graduate students..."

groups composed solely or primarily of "student/employees" other than house staff are known to currently exist although information in this area is regrettably often somewhat incomplete.(52) While there may well be instances where a small number of students have been included by the parties in primarily non-student bargaining units at universities (such as clerical, maintenance, cafeteria or craft units), such data cannot readily be ascerned, and seems to be of little significance to the basic legal issues involved.

Of note, it would appear unwise to underestimate the importance of this issue concerning the collective bargaining status of "student/employees" to the nation's post-secondary educational institutions. It is estimated that the number of interns and residents alone exceeds 60,000.(53) There are undoubtedly tens of thousands of additional "student/employees" in such categories as graduate assistants, teaching assistants, research fellows and clinical fellows, though precise data are hard to come by.(54) While there is little information as to the total number of students working in cafeterias and other university facilities, the number is unqestionably substantial.

Moreover, any judicial or legislative decision to grant broad collective bargaining rights to such "student/employees" would undoubtedly release a "Pandora's box" of cases on the impermissible, permissible and mandatory subjects of collective bargaining for such individuals whose almost every concern in relationship to their "employment" also has educational or training significance.

It has also been questioned whether the granting of collective bargaining status to such individuals will have so many undesirable repercussions to the institutions involved(55) that it will substantially reduce their willingness to continue providing the assistantship, research and patient care positions at issue, although it is currently difficult to contemplate how many of the vital educational experiences and, for that matter, service activities involved can be adequately provided for by alternate means.

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(52) This, of course, excludes any reference to student involvement in faculty collective bargaining in an entirely separate subject with a substantial body of literature of its own; see, for example, Students and Collective Bargaining edited by Alan Shark and Kathleen Brouder, Research Foundation of the City University of New York; New York, 1976.

(53) "Medical Education in the United States," p. 74, 74th Annual Report, Journal of the American Medical Association, Chicago, 1975.

(54) For example, it was estimated that in 1974-75, there were approximately 2,000 teaching assistants and associates in N.Y.S. alone; "Employees in Colleges and Universities in New York State, 1974-75" State Education Dept., Albany.

(55) Not the least of which is its expected tendency to encourage the unionization of faculty and increase the militancy of the overall student body, both "employee" and non-employee."

In sum, there is little doubt that numerous educational institutions are anxiously awaiting the administrative, judicial and legislative resolution of the rather important issues involved in regard to the collective bargaining status of their "student/employees" and would welcome an early and clear expostulation of their rights and obligations in an area of such particular sensitivity and importance.

ADDENDUM

On May 26th of this year, approximately one month after the above article was written and distributed on a limited basis, the NLRB issued a decision on reconsideration in St. Clare's Hospital 229 NLRB No. 158, in which the Board, in seeking to clarify its position on house staff, articulated in clearer language that on any previous occasion its overall policy of denying collective bargaining rights to all students who "work" at their own educational institution. It might be noted that in St. Clare's, the Board separately categorized those cases involving students working at their educational institutions who "perform services... which are directly related to their educational program" (e.g., residents or graduate assistants) from cases where students were "employed at their own educational institutions in a capacity unrelated to their course of study" (e.g., students in cafeteria). In both such situations, however, the Board made clear that its policy was to deny all such individuals collective bargaining rights.